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Lembaga Tabung Haji & Anor v Encap Sdn Bhd

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COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCvC)(W)-429–06 OF 2022
HANIPAH FARIKULLAH, AZIMAH OMAR AND AZHAHARI KAMAL JJCA
14 NOVEMBER 2023

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Contract — Breach — Breach of agreement — Respondent claimed against appellants for unlawful termination and breach of service provider agreement — Whether termination of service provider agreement by first appellant was valid and lawful — Whether it was appropriate for respondent to presume that appellants had agreed with proposed draft agreement — Whether it was appropriate for High Court to allow respondent's claim for expectation loss/profit loss based on appellant's projection — Whether appellants jointly and severally liable to respondent — Whether exemplary damages ought to be granted to respondent

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This was an appeal against the learned High Court judge's decision to allow the respondent's claim against the appellants for unlawful termination and breach of a service provider agreement ('the SPA'). The first appellant ie Lembaga Tabung Haji ('LTH') had entered into the SPA in which LTH had appointed the respondent ie Encap Sdn Bhd ('Encap') to supply to LTH a cash management system ('CMS') in the form of ATM cards system to replace LTH's archaic physical counters cash withdrawal system for the convenience of LTH's pilgrims ('debit card SPA'). Over the period from 2011 until the signing of the debit card SPA, LTH had constantly shifted its demands and features that LTH required to be developed and delivered by the respondent. The initial form of CMS LTH intended under the 'Kad TH Project' was the ATM card. Subsequently, LTH requested that the feature and concept of the ATM card to be a debit card which was able to be linked to the Malaysian Electronic Payment System ('MEPS') which expanded the usability of the debit card even across other local Malaysian banks and ATMs. Circa 2014, the LTH yet again shifted the goalpost and instructed the respondent to develop the debit card CMS to be able to be linked to MasterCard instead of MEPS. Thus, the debit card SPA was entered into in view of a CMS utilising a debit card with connectivity and link to MasterCard ('debit MasterCard'). Since a license from Bank Negara Malaysia ('BNM') was required to be able to implement the debit MasterCard CMS, LTH incorporated its wholly owned subsidiary, the second appellant ie Premia Cards Sdn Bhd ('Premia') solely for the purpose of holding the license which the LTH sought to obtain from BNM. Subsequent to Premia's incorporation, Premia applied to BNM for the necessary license to

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issue debit MasterCards. BNM rejected Premia's application and suggested that the concept of the debit MasterCard to be changed to prepaid cards which would have a higher likelihood to be approved by BNM. In adherence to BNM's suggestion, the appellants continued dealings and relations with the respondent and collectively pursued the implementation of a prepaid cards CMS (despite the original concept of debit MasterCards under the debit card SPA). A new draft for a second agreement for prepaid cards CMS ('draft prepaid card SPA') were already in negotiation between the parties. Despite clear continued works beyond the scope of the original debit card SPA (and in acquiescence and admission to the variations as per the draft prepaid card SPA), via a letter of termination, LTH had terminated the respondent's appointment on the basis that LTH was not able to obtain the requisite BNM license for the issuance of debit cards under the original terms of the debit card SPA. LTH's sudden termination had left the respondent with no other option but to commence a suit against the appellants. The learned High Court judge had allowed the respondent's claim and hence this appeal.

Held, allowing the appeal in part:

(1) Although there was never any actual signing or execution of the draft prepaid card SPA, nonetheless the appellants' own conducts were a far cry from any legitimate call or expectation for a strict formal execution of a subsequent contract. Since the appellants themselves had acted against their own call for formality, it would be severely unjust to impose such formality against the respondent. The appellants could not blow hot and cold regarding the respondent's continued appointment as the CMS provider even after the parties had mutually moved away from the terms and concept of the initial debit card SPA. The appellants should be estopped from denying the applicability of the draft prepaid card agreement. The appellants had by their own hands elected not to terminate the contractual relationship with the respondent, and instead unequivocally elected to affirm and perform works within the scope and concept of the draft prepaid card SPA. The conducts and correspondences to affirm the draft prepaid card SPA (in varying the debit card SPA) were squarely within the stipulation and allowance of variation by way of correspondences already mutually agreed under cl 23.7 of the debit card SPA. Thus, the respondent's claim in actuality was supported both in contract law and in equity. LTH's termination of the contract was indeed unlawful and wrong. It was indeed appropriate for the respondent to presume that the appellants had agreed with the draft prepaid card SPA (as a variation to the signed debit card SPA) (see paras 28–29, 32–33 & 35–37).

(2) The projection relied upon by the respondent was the appellant's own tabulation and mathematical calculation of what the appellant had admitted to BNM to be the projected profit that the respondent would

have earned if the contract was successfully performed. Thus, the calculation was not at all a baseless conjecture. There was evidence in the form of the appellants' own admission and calculation. There was clear mathematical methodology in which the appellants derived the projected sum of profits. Furthermore, it certainly would not reflect kindly to the appellants' integrity if the appellants insisted that the same calculation they had submitted to BNM was a mere figment of their imagination. Thus, it was infinitely more probable than not that the figures that the appellants have submitted to BNM, were the figures that the appellants genuinely admit and believe to be reasonable and truthful. It was just and appropriate for the learned judge to allow the respondent's claim for expectation loss/profit loss based on the appellants' own projection submitted to BNM (see paras 41–42 & 45).

(3) Considering Premia's sole purpose of incorporation for the sole sake and benefit of LTH, it was exceedingly clear that Premia owed a fiduciary duty to LTH as LTH's proxy BNM license-holder. The parent-subsidiary relationship between LTH and Premia was not at all the typical commercial relationship between a parent company and an independent subsidiary who existed as a separate commercial arm with its own independent commercial vision and mission. Premia existed solely for LTH's commercial interest in the Kad TH Project. Premia and LTH ought to be considered as the same one and singular entity. Since the incorporation and introduction of Premia, all dealings between the parties had reflected a tripartite arrangement/agreement to which there were no demarcation at all drawn between LTH and Premia in their dealings with the respondent. Additionally, it was not necessary for the respondent to plead a case on fraud so as to entitle them to lift the corporate veil. It sufficed that the respondent sufficiently pleaded facts that would prove that the justice required that the corporate veil to be lifted. The learned judge was correct in his finding of joint and several liability of the appellants (see paras 54–55, 58, 60 & 61).

(4) Mere wrongful conduct did not necessarily warrant the court's award of exemplary damages. The appellants' conduct (although in breach of the draft prepaid card SPA) could not be equated to an outrageous conduct warranting the grant of exemplary damages. Therefore, the learned High Court judge had manifestly erred when he found that both the appellants were jointly and severally liable to the respondent for the sum of RM2m in exemplary damages (see paras 76 & 80).

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana untuk membenarkan tuntutan responden terhadap perayu untuk penamatan yang menyalahi undang-undang dan pelanggaran perjanjian penyedia perkhidmatan ('SPA'). Perayu pertama iaitu Lembaga Tabung Haji

('LTH') telah memeterai SPA di mana LTH telah melantik responden iaitu Encap Sdn Bhd ('Encap') untuk membekalkan kepada LTH satu sistem pengurusan tunai ('CMS') dalam bentuk sistem kad ATM untuk menggantikan sistem pengeluaran tunai kaunter fizikal LTH untuk kemudahan jemaah haji LTH ('SPA kad debit'). Sepanjang tempoh dari 2011 sehingga menandatangani SPA kad debit, LTH sentiasa mengalihkan tuntutan dan ciri-ciri yang LTH perlukan untuk dibangunkan dan dihantar oleh responden. Bentuk awal CMS yang dicadangkan LTH di bawah 'Projek Kad TH' ialah kad ATM. Selepas itu, LTH meminta supaya ciri dan konsep kad ATM menjadi kad debit yang boleh dikaitkan dengan Sistem Pembayaran Elektronik Malaysia ('MEPS') yang memperluaskan kebolehgunaan kad debit itu hingga merentasi bank dan ATM tempatan Malaysia yang lain. Sekitar 2014, LTH sekali lagi mengalihkan keadaan dan mengarahkan responden untuk menghasilkan CMS kad debit supaya boleh dipautkan kepada MasterCard dan bukannya MEPS. Oleh itu, SPA kad debit telah dimeterai berasaskan CMS menggunakan kad debit dengan sambungan dan pautan ke MasterCard ('debit MasterCard'). Memandangkan lesen daripada Bank Negara Malaysia ('BNM') diperlukan untuk dapat melaksanakan CMS debit MasterCard, LTH memperbadankan anak syarikat milik penuhnya, perayu kedua iaitu Premia Cards Sdn Bhd ('Premia') semata-mata untuk tujuan pegangan lesen yang LTH ingin dapatkan daripada BNM. Selepas pemerbadanan Premia, Premia memohon kepada BNM untuk mendapatkan lesen yang diperlukan untuk mengeluarkan debit MasterCard. BNM menolak permohonan Premia dan mencadangkan konsep debit MasterCard ditukar kepada kad prabayar yang berkemungkinan lebih tinggi untuk diluluskan oleh BNM. Selaras dengan cadangan BNM, perayu meneruskan urusan dan hubungan dengan responden dan secara kolektif meneruskan pelaksanaan CMS kad prabayar (walaupun konsep asal debit MasterCard di bawah SPA kad debit). Draf baharu untuk perjanjian kedua untuk CMS kad prabayar ('draf SPA kad prabayar') telah pun dalam rundingan antara pihak. Walaupun kerja berterusan yang jelas di luar skop SPA kad debit asal (dan dengan persetujuan dan penerimaan kepada variasi seperti dalam draf SPA kad prabayar), melalui surat penamatan, LTH telah menamatkan pelantikan responden atas dasar bahawa LTH tidak boleh mendapatkan lesen BNM yang diperlukan untuk pengeluaran kad debit di bawah syarat asal SPA kad debit. Penamatan mendadak LTH menyebabkan responden tiada pilihan lain selain memulakan saman terhadap perayu. Hakim Mahkamah Tinggi yang bijaksana telah membenarkan tuntutan responden dan oleh itu rayuan ini.

Diputuskan, membenarkan sebahagian rayuan:

(1) Walaupun tidak pernah ada sebarang tandatangan atau pelaksanaan sebenar draf SPA kad prabayar, namun kelakuan perayu-perayu sendiri adalah jauh daripada sebarang jangkaan atau harapan sah untuk pelaksanaan rasmi yang ketat bagi kontrak berikutnya. Memandangkan

perayu-perayu sendiri telah bertindak menentang tuntutan mereka sendiri untuk formaliti, adalah amat tidak adil untuk mengenakan formaliti sedemikian terhadap responden. Perayu-perayu tidak boleh bersikap tidak endah berhubung pelantikan berterusan responden sebagai penyedia CMS walaupun selepas kedua-dua pihak telah saling menjauhkan diri daripada terma dan konsep SPA kad debit permulaan. Perayu harus dihalang daripada menafikan kebolehgunaan draf perjanjian kad prabayar. Perayu-perayu dengan tangan mereka sendiri memilih untuk tidak menamatkan hubungan kontrak dengan responden, dan sebaliknya secara tegas dipilih untuk mengesahkan dan melaksanakan kerja-kerja dalam skop dan konsep draf SPA kad prabayar. Kelakuan dan surat-menyurat untuk mengesahkan draf SPA kad prabayar (dalam mengubah SPA kad debit) adalah dalam ketetapan dan kelonggaran variasi melalui surat-menyurat yang telah dipersetujui bersama di bawah klausa 23.7 SPA kad debit. Oleh itu, tuntutan responden pada hakikatnya disokong kedua-dua dalam undang-undang kontrak dan dalam ekuiti. Penamatan kontrak LTH sememangnya menyalahi undang-undang dan salah. Sememangnya wajar bagi responden untuk menganggap bahawa perayu telah bersetuju dengan draf kad prabayar SPA (sebagai variasi kepada SPA kad debit yang ditandatangani) (lihat perenggan 28–29, 32–33 & 35–37).

(2) Unjuran yang disandarkan oleh responden adalah penjadualan perayu sendiri dan pengiraan matematik tentang apa yang telah diakui oleh perayu kepada BNM sebagai unjuran keuntungan yang akan diperolehi oleh responden sekiranya kontrak itu berjaya dilaksanakan. Oleh itu, pengiraan itu sama sekali bukan satu sangkaan yang tidak berasas. Terdapat keterangan dalam bentuk pengakuan dan pengiraan perayu sendiri. Terdapat metodologi matematik yang jelas di mana perayu memperoleh jumlah keuntungan yang diunjurkan. Tambahan pula, ia pastinya tidak akan mencerminkan integriti perayu sekiranya perayu menegaskan bahawa pengiraan yang sama yang mereka kemukakan kepada BNM adalah rekaan semata-mata imaginasi mereka. Oleh itu, adalah lebih berkemungkinan besar daripada tidak bahawa angka-angka yang telah dikemukakan oleh perayu kepada BNM, adalah angka-angka yang diakui dan dipercayai oleh perayu-perayu sebagai munasabah dan benar. Adalah adil dan wajar bagi hakim yang bijaksana membenarkan tuntutan responden untuk jangkaan kerugian/kerugian keuntungan berdasarkan unjuran perayu sendiri yang dikemukakan kepada BNM (lihat perenggan 41–42 & 45).

(3) Memandangkan tujuan tunggal Premia diperbadankan untuk kepentingan dan manfaat LTH, adalah sangat jelas bahawa Premia mempunyai kewajipan fidusiari kepada LTH sebagai pemegang lesen BNM proksi LTH. Hubungan induk-subsidiari antara LTH dan Premia bukanlah hubungan komersial biasa antara syarikat induk dan anak

syarikat bebas yang wujud sebagai cabang komersial yang berasingan dengan visi dan misi komersialnya sendiri. Premia wujud semata-mata untuk kepentingan komersial LTH dalam Projek Kad TH. Premia dan LTH sepatutnya dianggap sebagai entiti yang sama dan tunggal. Sejak pemerbadanan dan pengenalan Premia, semua urus niaga antara pihak-pihak telah mencerminkan pengaturan/perjanjian tiga pihak yang mana tiada persempadanan sama sekali dibuat antara LTH dan Premia dalam urusan mereka dengan responden. Selain itu, responden tidak perlu memplid kes penipuan untuk melayakkan mereka menyingkap tirai perbadanan. Adalah memadai bahawa responden cukup memplid fakta yang akan membuktikan bahawa keadilan memerlukan tirai perbadanan itu disingkap. Hakim yang bijaksana adalah betul dalam penemuan liabiliti bersama dan berasingan perayu (lihat perenggan 54–55, 58, 60 & 61).

(4) Kelakuan salah semata-mata tidak semestinya mewajarkan mahkamah memberikan ganti rugi teladan. Kelakuan perayu (walaupun melanggar draf kad prabayar SPA) tidak boleh disamakan dengan kelakuan keterlaluan yang menjamin pemberian ganti rugi teladan. Oleh itu, hakim Mahkamah Tinggi yang bijaksana telah secara nyata terkhilaf apabila mendapati bahawa kedua-dua perayu bertanggungjawab secara bersama dan berasingan kepada responden untuk sejumlah RM2 juta sebagai ganti rugi teladan (lihat perenggan 76 & 80).]

Cases referred to

Big Junkyard Sdn Bhd & Anor v Chan Kah Wai (berniaga dibawah nama Ytwo Coffee House) [2022] MLJU 2923; [2023] 1 CLJ 564, HC (refd)

Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v Loo Ah Chew & Sons Sdn Bhd [2003] MLJU 139, HC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331, FC (refd)

Cheah Theam Kheng v City Centre Sdn Bhd (in liquidation) [2012] 1 MLJ 761; [2012] 2 CLJ 16, CA (refd)

Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors [1993] 3 MLJ 352, HC (refd)

Ho Yau Hong & Ors v How Yaw Ming and another appeal [2023] MLJU 933, CA (refd)

Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd) [2018] 2 MLJ 292; [2018] 1 CLJ 415, FC (folld)

Integrated Training Services Sdn Bhd v Kerajaan Malaysia & Ors [2022] 3 MLJ 77; [2022] 1 LNS 528, FC (refd)

Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal [2021] 1 MLJ 629, CA (refd)

Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal [2006] 1 MLJ 675, CA (refd)
Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors [2009] 4 MLJ 610, CA (refd)
Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor [2008] 4 MLJ 157, CA (refd)
RDS Bina Sdn Bhd v Ong Chin Hoe & Anor [2014] 11 MLJ 606, HC (refd)
Rookes v Barnard [1964] AC 1129, HL (folld)
Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784, CA (refd)
Sime UEP Properties Bhd v Woon Nyoke Lin [2002] 3 CLJ 719, CA (distd)
Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan [2005] 1 MLJ 515, CA (refd)
Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd (previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785, FC (folld)
Tanjung Teras Sdn Bhd v Kerajaan Malaysia [2015] MLJU 2161, CA (refd)
Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor [1993] 1 MLJ 443, HC (refd)
Yahya Mohd Khalid v MISC Berhad [2020] MLJU 77, CA (refd)

Legislation referred to

Contracts Act 1950 s 71

Appeal from: *Encap Sdn Bhd v Lembaga Tabung Haji & Anor* [2022] MLJU 1565 (High Court, Kuala Lumpur)

Alvin Julian (with Long Mohd Noor Adman and Nur Nabila Roelee) (Zaid Ibrahim & Co) for the appellant.
David Morais (with Pavitra Pillai and Sara bt Jailany) (M David Morais) for the respondent.

Azimah Omar JCA (delivering judgment of the court):

INTRODUCTION

[1] The appeal before us is an appeal against the learned High Court judge's ('learned judge') decision to allow the respondent-plaintiff's claim against the appellants-defendants for unlawful termination and breach of a service provider agreement dated 8 August 2014.

[2] The parties in the appeal are namely; Lembaga Tabung Haji ('the first appellant/LTH'), Premia Cards Sdn Bhd ('the second appellant/Premia') and Encap Sdn Bhd ('the respondent/Encap').

A BACKGROUND FACTS

[3] For a better understanding of the matter at hand, it is necessary to set out the facts of the case that has led to the present appeal before us. LTH ('the first appellant/the first defendant') and Encap ('the respondent/the plaintiff') had entered into a service provider agreement ('SPA') dated 8 August 2014 in which LTH had appointed Encap to supply to LTH a cash management system ('CMS') in the form of ATM cards system to replace LTH's archaic physical counters cash withdrawal system for the convenience of LTH's pilgrims ('debit card SPA').

[4] The debit card SPA was entered into, following a series of correspondences since 2011 which culminated LTH's appointment of the respondent.

[5] Over the period from 2011 until the signing of the debit card SPA, LTH had constantly shifted its demands and features that LTH required to be developed and delivered by the respondent. The initial form of CMS LTH intended under the 'Kad TH Project' was the ATM card. Subsequently, LTH requested that the feature and concept of the ATM card to be a debit card which was able to be linked to the Malaysian Electronic Payment System ('MEPS') which expands the usability of the debit card even across other local Malaysian banks and ATMs. Upon the proposal by the respondent, LTH issued a letter of acceptance on 1 November 2013 agreeing to the respondent's proposal ('MEPS LOA').

[6] Circa 2014, the LTH yet again shifted the goalpost and instructed the respondent to develop the debit card CMS to be able to be linked to MasterCard (instead of MEPS). Thus, the debit card SPA was entered into in view of a CMS utilising a debit card with connectivity and link to MasterCard ('debit MasterCard')

[7] Since a license from Bank Negara Malaysia ('BNM') was required to be able to implement the debit MasterCard CMS, LTH incorporated its wholly-owned subsidiary, Premia ('the second appellant/the second defendant') solely for the purpose of holding the license which the first appellant seeks to obtain from BNM. Subsequent to Premia's incorporation, Premia applied to BNM for the necessary license to issue debit MasterCards on 21 June 2016 ('Premia's first application')

[8] Circa 2018, BNM rejected Premia's first application. Instead, BNM suggested that the concept of the debit MasterCard to be changed to prepaid cards ('prepaid cards') which would have a higher likelihood to be approved by BNM.

[9] In adherence to BNM's suggestion, LTH and Premia continued dealings and relations with the respondent and collectively pursued the implementation of a prepaid cards CMS (despite the original concept of debit MasterCards under the debit card SPA). Those continued works and relations, inter alia, include:

(a) after BNM's rejection, LTH via an email dated 18 January 2018 had instructed the respondent to now pursue and develop a prepaid card CMS instead of the initial debit MasterCard CMS;

(b) in acquiescence to the continued contractual relations in pursuit of the prepaid card CMS (with the respondent as the CMS provider), Premia applied to BNM for the second time, now for the license to issue out prepaid cards ('Premia's second application') on 12 February 2018;

(c) in view of the collective effort and endeavour of the parties (with the respondent still as the CMS provider), BNM accordingly on 13 March 2018, granted the requisite license to Premia to issue out TH prepaid cards;

(d) throughout the same material time of these continued works, a new draft for a second agreement for prepaid cards CMS ('draft prepaid card SPA') were already in negotiation between the parties. The terms of the draft prepaid card SPA (save for the actual execution of the draft by LTH's top brass) were already agreed upon by the parties on 6 June 2018;

(e) on 7 June 2018, upon Premia's registration, MasterCard had confirmed Premia's registration of the respondent as the CMS provider of Premia;

(f) on 8 June 2018, LTH had informed the respondent that Premia had already registered the respondent as Premia's CMS provider; and

(g) circa September 2018, the respondent had successfully delivered the prepaid card CMS to LTH. MasterCard's own country manager, Perry Ong, confirmed during trial that the system successfully went live.

[10] Despite these clear continued works beyond the scope of the original debit card SPA (and in acquiescence and admission to the variations as per the draft prepaid card SPA), via a letter of termination dated 30 November 2018, LTH had terminated the respondent's appointment on the basis that LTH was not able to obtain the requisite BNM license for the issuance of debit cards under the original terms of the debit card SPA.

[11] At this juncture, after diligently having pursued LTH's many variations and instructions, the respondent had already expended approximately RM12m (reliance loss) in performing its obligations under the debit card SPA and even the second draft prepaid card SPA. On the other hand, the admitted

lowest range fees which are projected to be payable to the respondent if the Project was properly performed (expectation loss) was RM42,287,500 (as per LTH's/Premia's own projections submitted to BNM in Premia's second application).

BEFORE THE HIGH COURT

[12] LTH's sudden termination had left the respondent with no other option but to commence a suit against both LTH and Premia before the High Court Kuala Lumpur. Upon a full trial, the learned judge had allowed the respondent's claim, inter alia, on the following core grounds:

(a) the learned judge had allowed the plaintiff's claim *but on a totally UNPLEADED and UNSUBMITTED ground of s 71 of the Contracts Act 1950* to abandon all of the written agreements ever negotiated and agreed upon, and just decide on the basis of a 'quasi-contract' based on parties' correspondences;

(b) the learned judge did not embark on meaningful deliberation on the parties' arguments on the applicability of the contract and the various 'variations' along the course of the relationship;

(c) the learned judge did not deliberate on the applicability of the *'proposed agreement' that was agreed upon BUT NOT YET EXECUTED* (that was proposed subsequent to BNM's refusal to grant the license to issue debit cards); and

(d) for quantum, the learned judge awarded RM42,287,500 (as per LTH's/Premia's own projections submitted to BNM in Premia's second application).

[13] Dissatisfied with the learned judge's decision, LTH and Premia filed the present appeal before us.

THE APPEAL BEFORE US

[14] We must mention here that when the appeal was called for hearing on 11 August 2023, before proceeding to hear the full oral submissions from the counsels for the appellants and the respondent with regard to the appellants' appeal, we had indicated to the parties that we have read the cause papers, the written submissions filed by the parties as well as the learned judge's grounds of judgment. Thus, we had asked both the counsels for the appellants and the respondent to clarify and address us on two preliminary issues which could save considerable judicial time if these issues can be determined by the parties from the outset. We then posed the following questions:

(a) what is the stand of the appellants and the respondent in respect of existence of contract between the appellants and the respondent? and

(b) if the appellants/respondent stood on the position that there was a contract entered into between the parties, then the next question is, was it appropriate for the learned judge to ignore the parties' pleadings and submission and rely on s 71 of the Contracts Act 1950 ('the Act') on his own accord whereas s 71 of the Act (award of *quantum meruit*) would only be applicable if there was no contract entered between the disputing parties.

[15] We had posed the above questions on the following reasons: It was admitted by both the appellants and respondent that *neither parties ever pleaded nor even submitted on s 71 of the Contracts Act 1950*. Upon examination of all the cause papers and the submissions filed by the both counsels for the appellants and the respondent, it is our preliminary view that the parties' relationship in the present appeal had been codified into a written contract. Therefore, the court cannot simply abandon the contracts (or its variations if any) and just resort to s 71 of the Contracts Act 1950. This is especially so considering the original debit card SPA *had already anticipated and provided for variations through parties' correspondence* vide *cl 23.7 of the debit card SPA*.

[16] It is also our preliminary view that in the present case, there were numerous contracts (and variations). But there was a dispute as to the final terms of the contract (due to the many variations, and issues as to execution). But the bottom line is that there was a contract. Thus, s 71 of the Contracts Act 1950 cannot apply to take precedence over the written contract. Section 71 of the Contracts Act 1950 is only relevant as a statutory remedy (and assessment) to claim for work done to avoid any party unjustly enjoying gratuitous performance of an act to the peril and expense of another.

[17] The nature and spirit of s 71 of the Contracts Act 1950 had eloquently been explained by the Court of Appeal in the case of *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] MLJU 2161:

> Juristic basis behind s 71
>
> [34] *Section 71 is the statutory embodiment of the common law principle of quantum meruit, which provides for a just compensation as the measure of the work done as opposed to contractual damages* (see: *Seow Yong Fatt, Craven-Ellis v Cannons Ltd* [1936] 2 KB 403; *Delpuri-Harl Corp JV Sdn Bhd v Perbadanan Kemajuan Negeri Selangor* [2015] 2 MLJ 24; [2014] 1 LNS 1075; *Spatial Ventures Sdn Bhd v Twintech Holdings Sdn Bhd* [2014] 8 MLJ 14).
>
> [35] *Liability under s 71 is not based on any existing contract between the parties. Rather it is based on the equitable principle of conscionable conduct and restitution to prevent unjust enrichment by one party at the expense of another party* (see: *Craven-Ellis v Cannons Ltd, Ramkrishna Shankarrao v Rangoobai and anr* AIR 1959 Bom 519;

(1958) 60 BOMLR 459; *Abu Mohammed v Mohammed Kunju Lebba* (1995) DMC 316 and *Pallonjee Eduljee and Sons v the Lonavala City Municipality* AIR 1937 Bom 417; (1937) 39 BOMLR 835). (Emphasis added.)

[18] In addition, we would also add that subsequent conducts may infer variation, acquiescence, or modification but it does not allow the court or the parties to abandon the contract altogether. It remains incumbent upon the learned judge to determine the final and appropriate terms under the contract based on the facts of the case and not to simply abandon all ties to the contracts the parties have negotiated and agreed upon.

[19] The law is trite that parties ought to be bound by their pleadings and since both parties have admitted to not have pleaded or even submitted facts or a case under s 71 of the Contracts Act 1950, none of the parties or even the court should be allowed to rely on this unpleaded contention.

[20] We must also mention here that having heard the submissions from both the counsels for the appellants and the respondent on the preliminary issues (ie the existence of a contract between parties and the application of s 71 of the Act by the learned High Court judge) we certainly appreciate that both the parties had agreed that they will not pursue these two issues. That being the case, it is our considered view that the propriety of the appeal before us can be determined by addressing the following issues:

(a) issue 1: whether the termination of the debit card SPA dated 8 August 2014 by the first appellant via letter dated 30 November 2018 was valid and lawful;

(b) issue 2: was it appropriate for the respondent to presume that the appellants have agreed with the proposed draft (variation to the signed debit card SPA dated 8 August 2014); and

(c) issue 3: was it appropriate for the learned judge to allow the respondent's claim for expectation loss/profit loss based on the appellant's projection submitted to BNM?

ISSUE 1 AND ISSUE 2 ARE INTERTWINED WITH EACH OTHER. THEREFORE, BOTH ISSUES WILL BE DEALT TOGETHER.

Issue 1: Whether the termination of the debit card spa dated 8 August 2014 by the first appellant via letter dated 30 November 2018 was valid and lawful

Issue 2: Was it appropriate for the respondent to presume that the appellants have agreed with the proposed draft (variation to the signed debit card SPA)?

[21] Upon thorough examination and analysis of all evidence (oral and documentary) and the submissions of parties, we find that the learned judge (although embarking on the wrong tangent) was still correct in allowing the plaintiff-respondent's claim.

[22] The dissonance in the appellants' and respondent's case is verily simple. The appellants claimed that since there was no execution of any other contract other than the debit card SPA, the parties' terms and obligations shall be kept within the parameters of the debit card SPA. It was on this footing that LTH argued that it was right for it to terminate the debit card SPA (as LTH had failed to obtain the requisite BNM license to issue out the debit MasterCards).

[23] It was argued by the appellants that the termination of the debit card SPA by the first appellant (LTH) vide a termination letter dated 30 November 2018 was a valid and lawful exercise by the first appellant pursuant to cl 17.2 of the SPA. According to the counsel for the appellant, cl 17.2 of the SPA clearly provides that when the requisite licence for issuance of the debit cards for the Kad TH Project is not obtained from BNM, the first appellant was at liberty to terminate the debit card SPA. It was argued further that cl 17.2 had made it clear that the first appellant may terminate the SPA at any time by providing 30 days' prior notice (which the first appellant had done so via its letter dated 30 November 2018).

[24] In this regard, relying on the Federal Court's decision in the case of *Integrated Training Services Sdn Bhd v Kerajaan Malaysia & Ors* [2022] 3 MLJ 77; [2022] 1 LNS 528, the counsel for the appellants had urged that this court takes cognisance of the parties' freedom to contract.

[25] On the issue of variation of the debit card SPA dated 8 August 2014, notwithstanding that the appellants did not dispute that there was a proposed amendment, it was strenuously contended that the proposed amendment had not yet been concluded considering the fact that the core terms of the agreement (ie the consideration part, in particular the pricing/payments or the charge rates) had not been agreed upon. It was further contended by the appellants that the original annual charges/fees in the proposed draft was different from the original contract (debit card SPA dated 8 August 2014).

[26] It was also the contention of the appellants that since the respondent's payment entitlement under the debit card SPA would be the fees or charges for each card issued (ie when the debit card went live and active), therefore the proposed amendment or the variation cannot be said to have been concluded or finalised considering that the processing charges/payments or the pricing

had not been agreed upon (being the outstanding core part of the debit card SPA). Consequently, the variations upon the draft prepaid card SPA would not be a binding agreement.

[27] On the other hand, the respondent's contention was that the parties by their conducts (subsequent to BNM's rejection of Premia's first application for debit MasterCard license) have admitted, acknowledged, acquiesced, and elected to continue their contractual relations as per the draft prepaid card SPA. The counsel for the respondent argued that the learned judge had rightfully found that the notice of termination dated 30 November 2018 'is a sham and an attempt by the appellants to avoid financial culpability'.

[28] Although we are minded that there was never any actual signing or execution of the draft prepaid card SPA, nonetheless the appellants' own conducts (subsequent to BNM's rejection of the concept under the debit card SPA) were a far cry from any legitimate call or expectation for a strict formal execution of a subsequent contract. Since the appellants themselves have acted against their own call for formality, it would be severely unjust for us to impose such formality against the respondent.

[29] The appellants cannot blow hot and cold regarding the respondent's continued appointment as the CMS provider even after the parties have mutually moved away from the terms and concept of the initial debit card SPA. This is especially so considering the appellants have overtly admitted to the respondent's continued position as LTH and Premia's CMS provider under the prepaid MasterCard program after the debit MasterCard model was rejected by BNM.

[30] Many legal acrobatics were thrown by the appellants to eschew away from their own acquiescence and election to continue contractual relations with the respondent. Nonetheless, none of those acrobatics can mask the actual truth in the appellants' actual intent in continuing contractual relations with the respondent beyond the confines of the debit card SPA. Despite the non-execution of the draft prepaid card SPA:

(a) it was LTH's own CEO (Ameen) who had instructed the respondent to shift the development towards a prepaid card CMS model instead of a debit card model via LTH's email dated 18 January 2018;

(b) it was LTH and Premia who had applied to BNM (while still retaining the respondent as the CMS provider) for the license to issue out prepaid MasterCards on 12 February 2018;

(c) it was LTH and Premia who had applied to register the respondent as the CMS provider with MasterCard under the prepaid card model;

(d) it was upon LTH and Premia's application that MasterCard on 7 June 2018 confirmed the respondent's registration as the CMS provider under the prepaid card model;

(e) it was LTH itself that had informed the respondent that Premia had duly registered the respondent as Premia's CMS provider under the prepaid card model; and

(f) it was LTH itself that had proceeded to allow MasterCard's own country manager to conduct the appropriate test to determine that the prepaid card CMS delivered by the respondent had actually went live on 24 September 2018.

[31] Further compounding the appellants' conducts in election and acquiescence, were the testimonies of the appellants' own witnesses during trial:

(a) LTH's group CFO (Rozaida) confirmed that Encap had continued working with LTH and Premia to pursue the prepaid card system:

> MDM: And in fact, Encap was going on — was carrying on working with Tabung Haji and Premia Cards to impelement the Prepaid Card system. Is that correct
>
> *ROZAIDA: Benar, YA*

(b) LTH's group CFO (Rozaida) confirmed that it was reasonable ('munasabah') for Encap to assume that the amended terms were agreed upon:

> MDM: Thank you. So, as far as Encap is concerned, isn't it reasonable for Encap to assume that the amended terms were agreed? That's why they were carrying on working?
>
> ...
>
> *ROZAIDA: Munasabah, YA*

(c) LTH's own CEO (Ameen) overtly admitted during trial that all of the amendments in the draft prepaid card SPA were agreed upon and became the basis to instruct the respondent to continue work pursuing the prepaid cards model instead of the debit cards model:

> MDM: Alright. So I'm going to put this to you, En Ameen. As far as my client was concerned, as at 6.6.2018, everything had been agreed. *All of the amendments have been agreed. And that was the basis of which you continued to instruct them to work on the Prepaid Card*. And they worked on the Prepaid Card. Do you agree or not?
>
> Ameen: *Yes*.

[32] The barrage of evidence above is far too compelling to allow the appellants now to renege on their original admission, acquiescence, and election to continue contractual relations with the respondent. Considering the appellants' conducts, the appellants should be estopped from denying the applicability of the draft prepaid card agreement. If LTH was genuinely seeking for termination for the failure of the debit card model, then LTH should have terminated the signed debit card SPA *BEFORE works for under the draft prepaid card SPA were carried out*. It is now far too late for LTH and Premia to rely on the initial debit card SPA dated 8 August 2014 (wherein cl 17.2 of the SPA was vigorously and staunchly relied upon) when LTH and Premia both had acted beyond the scope and concept of the debit card SPA and acted in line with the draft prepaid card SPA in pursuit of the prepaid cards model. It was clear that the appellants have elected to proceed with the draft prepaid card SPA to carry on the works for the issuance of prepaid cards (no longer debit cards under old debit card SPA).

[33] The appellants have by their own hands elected not to terminate the contractual relationship with the respondent, and instead unequivocally elected to affirm and perform works within the scope and concept of the draft prepaid card SPA. It would be gravely unjust for us to allow the appellants to approbate and reprobate their stances at their whims and fancies. Suffice that we refer to the Court of Appeal decision in *Nirwana Construction Sdn Bhd v Pengarah Jabatan Kerja Raya Negeri Sembilan Darul Khusus & Anor* [2008] 4 MLJ 157:

> [118] In *my view, when the respondent allowed the appellant continued performance of the contract on more than one occasion, and even entering into a supplementary contract, the respondent had thereby elected to affirm the contract to run its course*. The appellant is entitled to regard it as such especially when the respondent accepted the contract from the appellant on 5 June 1996, which the *appellant is entitled to treat as the respondent having waived its right to terminate*. Nothing would be clearer and more equivocal than this conduct of the respondent (see *Berry v Hodson* [1988] 1 Qd R 361 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305). (Emphasis added.)

[34] Estoppel would also bar the appellants from constantly shifting the goalpost and contradicting their own prior admissions, acquiescence, and election (see *Ho Yau Hong & Ors v How Yaw Ming and another appeal* [2023] MLJU 933; *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; *Cheah Theam Kheng v City Centre Sdn Bhd (in Liquidation)* [2012] 1 MLJ 761; [2012] 2 CLJ 16).

[35] The conducts and correspondences to affirm the draft prepaid card SPA (in varying the debit card SPA) were squarely within the stipulation and allowance of variation by way of correspondences already mutually agreed

under cl 23.7 of the debit card SPA. Thus, the respondent's claim in actuality was supported both in contract law and in equity.

[36] The aforementioned in this part considered, we would answer *issue 1* in the *NEGATIVE*. LTH's termination of the contract was indeed unlawful and wrong.

[37] And all considered above, the answer in *issue 2* must be in the *POSITIVE*. It was indeed appropriate for the respondent to presume that the appellants have agreed with the draft prepaid card SPA (as a variation to the signed debit card SPA).

ISSUE 3: WAS IT APPROPRIATE FOR THE LEARNED JUDGE TO ALLOW THE RESPONDENT'S CLAIM FOR EXPECTATION LOSS/PROFIT LOSS BASED ON THE APPELLANT'S PROJECTION SUBMITTED TO BNM?

[38] Damages can either be expectation loss/profits (putting parties in position as if the contract was completely performed) or reliance loss/wasted expenditure (putting parties in a position before the contract was ever entered into). A claimant must elect one of the two. But the court can award reliance loss when expectation loss cannot be proven (see *Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v Loo Ah Chew & Sons Sdn Bhd* [2003] MLJU 139):

> A plaintiff in such a case has an election: he can *either claim for his loss of profits; or for his wasted expenditure*. *He cannot claim both*. If he has not suffered any loss of profit — or *if he cannot prove what his profits would have been — he can claim in the alternative the expenditure* which has been thrown away, that is wasted by reason of the breach. (Emphasis added.)

[39] In the present case, the respondent had elected to claim for expectation loss or loss of profits as though the contract had been successfully performed. And as a measure to gauge the profits the respondent would have earned had the contract been successfully performed, the respondent placed great reliance on the appellants' own admission of a projected sum of profits which the appellants themselves have submitted to BNM via Premia's second application (for the prepaid card license).

[40] Now, the appellants' primary qualm against the learned judge's assessment of damages was that supposedly the calculation tabulated in the breakdown of projected profits (that was prepared and submitted by the appellants themselves to BNM) were merely projections without any basis. We are indeed aware that it is trite law that projections per se are not valid proof of damages (see *Sime UEP Properties Bhd v Woon Nyoke Lin* [2002] 3 CLJ 719):

> It is clear from the authorities that in order to succeed in claims for *damages* for loss

of profit one must establish the actual losses one would have suffered as a result of the breach. *A projection as in this case is not sufficient to establish the would be losses of profit*. A venture into a business would not necessarily mean that one can make a profit out of it because there are instances where people suffer losses. Not all businesses end up with a profit. It is clear to us that the respondent failed to establish the expected losses as a result of the breach. (Emphasis added.)

[41] However, distinctive and distinguishable from *Sime UEP*, the projection relied upon by the respondent was not Encap's own baseless projection. Instead, the projection was the appellant's own tabulation and mathematical calculation of what the appellant had admitted to BNM to be the projected profit that the respondent would have earned if the contract was successfully performed. It cannot at all be said that the respondent's calculation was mere conjecture or speculative because:

(a) the expected profit was mathematically calculated based on the costs payable to the respondent for issuance of new cards (RM1.50 per new cardholder) and renewal of existing cards (RM3.50 per renewal). These costs were then multiplied by the foreseeable or expected number of pilgrim cardholders over a five years' period. In the worst-case scenario, the appellants own submitted and admitted projection of profit payable to the respondent stood at RM42,287,500;

(b) this calculation was the appellants' calculation and not the respondent's self-serving calculations. Thus, from the outset this was the calculation of profits which were readily admitted and acknowledged by the appellants themselves; and

(c) this calculation by the appellants was the exact same calculation that the appellants had submitted to BNM (as the truth) for BNM's vetting in view of obtaining the BNM's approval to grant the requisite license for the appellants to issue out the prepaid MasterCards.

[42] Thus, the calculation was not at all a baseless conjecture. There was evidence in the form of the appellants' own admission and calculation. There was clear mathematical methodology in which the appellants derived the projected sum of profits. Furthermore, it certainly would not reflect kindly to the appellants' integrity if the appellants insisted that the same calculation they have nonchalantly submitted to BNM was a mere figment of their imagination. Thus, it is infinitely more probable than not that the figures that the appellants have submitted to BNM, were the figures that the appellants genuinely admit and believe to be reasonable and truthful. There must be gruelling gravity attached to the calculation if the appellants were willing and ready to submit the same to a critical national governing body such as BNM.

[43] The Court of Appeal had very recently dealt with this exact instance where the computation of profits was readily admitted by defendant in the case of *Kumpulan Prasarana Rakyat Johor Sdn Bhd v Emercon Bina Sdn Bhd and another appeal* [2021] 1 MLJ 629. In Emercon, the Court of Appeal dealt with the instance where the plaintiff's calculations for projected profits were readily agreed by the defendant. The Court of Appeal held that since the projection was already admitted and was within the contemplation of the defendant, it was no longer open for the defendant to argue that the projections were mere speculation or conjecture:

> [201] The *defendant had without qualification, agreed to the computations*. The projected figures were from the inception, ie from the year 1998. *Thus, it is not open to them now to submit that the assessment was speculative and conjecture or projection which is not sufficient to prove loss of profits*. Unlike Bank Muamalat Malaysia Berhad, there was supporting evidence to show how the figures in the said assessment and estimation were arrived as found in the development agreement and the relevant documents thereto and exhs P1–P4. (Emphasis added.)

[44] The appellants' admission in the present case is infinitely more damning considering the projection was not the respondent's projection. Instead, it was the appellants own admitted calculations which was readily submitted to BNM for vetting and approval.

[45] All the above in this part considered, we answer *issue 3 in the POSITIVE*. It was just and appropriate for the learned judge to allow the respondent's claim for expectation loss/profit loss based on the appellants' own projection submitted to BNM.

JOINT AND SEVERAL LIABILITY OF THE APPELANTS

[46] On the issue of the joint and several liability of LTH/Premia/privity of contract between the second appellant and the respondent, the counsel for the respondent argued that there was a material error on the part of the learned judge in lifting up the corporate veil in the instant case which resulted in LTH/Premia being jointly and severally liable and responsible to the respondent.

[47] It was argued on behalf of the appellants that the learned judge had erred in law and/or fact when he found that both the appellants are jointly and severally liable to the respondent for the sum of RM2m for exemplary damages. The counsel for the appellants submitted that the respondent had never pleaded that the appellants are to be held jointly and severally liable. Nor did the respondent sought or pleaded for the corporate veil of the second appellant to be lifted and/or pierced. Relying on the decision of the Federal Court decisions in the case *Solid Investments Ltd v Alcatel-Lucent (M) Sdn Bhd*

(previously known as Alcatel Network Systems (M) Sdn Bhd) [2014] 3 MLJ 785 and *Iftikar Ahmed Khan (as the executor of the estate for Sardar Mohd Roshan Khan, deceased) v Perwira Affin Bank Bhd (previously known as Perwira Habib Bank Malaysia Bhd)* [2018] 2 MLJ 292; [2018] 1 CLJ 415, the counsel for the appellants submitted that the learned judge was clearly in error in fact/in law in his finding that both the appellants are jointly and severally liable to the respondent in the damages sustained by the respondent.

[48] Now, we are minded that the Federal Court in *Alcatel-Lucent* had pronounced that only conducts of fraud would entitle the court to lift the corporate veil and that it is no longer sufficient to merely prove that it is in the interest of justice to do so. Nonetheless, the full breadth of the Federal Court's decision does not render this general rule to be immutable. Of course, we are in agreement with this general rule, but we are also aware that most of the precedents deciding on the issue of lifting the corporate veil almost always have placed caveats in that the propriety of the piercing must always be tested against any given case's factual matrix. We must highlight that there is also a plethora of precedents which had (by its own respective factual matrix) had allowed the lifting of the corporate veil when *Lucent* had mentioned of a 'flexible approach' in existence in determining the propriety of piercing the corporate veil:

> *Even if we were to apply the flexible approach* to the circumstances of the case we are of the view that such fiduciary relationship did not exist in the case. This is because commercial transactions often *do not give rise to fiduciary duties because they do not meet the criteria for characterization as fiduciary in nature* (see *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd (Matter No S309/2009)* [2010] HCA 19 High Court of Australia). We also find it useful to refer to the judgment of the High Court of Australia in *Hospital Products Limited v United States Surgical Corporation & Ors* at p 69 where Gibbs CJ said:
>
> > On the other hand, the fact that the arrangement between the parties was of a purely commercial kind and *that they had dealt at arm's length and on an equal footing has consistently been regarded by this Court as important, if not decisive, in indicating that no fiduciary duty arose*: see *Jones v Bouffier* (1911) 12 CLR 579; *Dowsett v Reid* (1912) 15 CLR 695; *Para Wirra Gold & Bismuth Mining Syndicate NL v Mather* [1934] 51 CLR 582; *Keith Henry & Co Ptv Ltd v Stuart Walker & Co Ptv Ltd* (1958) 100 CLR 342. A similar view was taken in Canada in *Jirna Ltd v Mister Donut of Canada Ltd* (1971) 22 DLR (3d) 639. (Emphasis added.)

[49] So, to argue that the principle in *Alcatel-Lucent* is without exception would be gravely erroneous. It must be appropriately understood that the Federal Court had found that principal companies and subsidiaries within the same group of companies maintain a separate veil *so long as it can be proven that*:

(a) *the two companies had always dealt with each other on an EQUAL FOOTING*; *and consequently*; and

(b) *the two companies do not owe any fiduciary duty from one another*.

[50] Now, applying this exception in the present case, it is profoundly obvious that Premia had never dealt with LTH on an equal footing. It was even readily admitted by LTH and Premia that Premia was incorporated solely for the purpose of holding the BNM license on behalf of LTH. Premia's in-depth involvement within the Kad TH Project had always hung on at the mercy and courtesy of LTH.

[51] It is thus opportune for us to refer to a very recent Court of Appeal decision which had astutely reminded that precedents dealing with the issue of the corporate veil ought not to be applied too strictly and must always consider the nuances of each individual case's factual matrix (see *Yahya Mohd Khalid v MISC Berhad* [2020] MLJU 77):

> [21] There are no shortage of Malaysian cases on 'lifting' save that *those cases must only be treated as a guideline based on its own special facts and must not be treated as a statutory proposition of any kind. The underlying test is the justice of the case and the gravity of the breach to the rule of law*, based on jurisprudence and not necessarily the strictures placed in judicial precedents ...
>
> [22] *It is unfortunate the dicta of the Court of Appeal in Law Kam Loy* which refused to 'lift' based on only technical grounds *was endorsed by the Federal Court* in the case of *Solid Investments Ltd v Alcatel Lucent (Malaysia) Sdn Bhd* [2014] 3 MLJ 785; [2014] 3 CLJ 73 *to advocate a high threshold to 'lift'*. Though, the Federal court had placed a stringent test as opposed to a liberal test to 'lift', *again the decision is based on 'fact centric' issues*. It must also be noted that Lord Keith's statement in *Adams v Cape Industries Plc* [1990] Ch 433 which the Federal Court had relied, was not restricting 'lifting' where rule of law is breached but was limiting its scope when it relates to a group of companies. *And in those cases, Lord Keith had suggested extra caveats*. It must be noted that *Law Kam Loy*'s jurisprudence was endorsed by the Federal Court, when the facts of *Law Kam Loy*'s case had little to do with the group of companies issues as in Adams case or the Federal Court's decision itself. It must also be noted that the decision of the *Federal Court on Solid Investment is good law* in relation to group of companies on *ITS OWN SPECIAL FACTS. That distinction must be kept in mind*. (Emphasis added.)

[52] We are inclined to agree with the ratio decidendi above in that the high threshold in *Alcatel-Lucent* ought not be strictly hailed as the be all and end all authority to determine the propriety of piercing the corporate veil. The high threshold to lift might have been applicable to the special facts in *Alcatel-Lucent* in which the associated companies had always operated on equal footing with not any company being subservient to another. The associated companies in *Alcatel-Lucent* were independent and were conducting their own respective trade and businesses. The two companies tend to their own distinct commercial interests and were not bound to any relationship of trust and confidence between one another. This was the special facts in *Alcatel-Lucent*

which led the Federal Court to be dissuaded from piercing the corporate veil:

> [31] In *Bristol and West Building Society v Mothew* [1998] Ch 1 at p 18, Millet LJ made the following observation on the question of who is a fiduciary:
>
> > *A fiduciary is someone who has undertaken to act for or on behalf of another in a particular matter in circumstances which give rise to a relationship of trust and confidence*. The distinguishing obligation of a fiduciary is the obligation of loyalty. *The principal is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith*; *he must not make a profit out of his trust*; *he must not place himself in a position where his duty and his interest may conflict*; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. (Emphasis added.)

[53] On that score, this is the exactly the special facts which were entirely distinguishable and distinct from the present case. Premia clearly is a fiduciary to LTH. Premia was put in a position of trust and confidence to hold the BNM license on behalf of LTH. LTH as principal is indeed entitled to Premia's loyalty and the expectation that Premia would hold the BNM license in good faith for the best interest of LTH.

[54] Additionally, considering Premia's sole purpose of incorporation for the sole sake and benefit of LTH, it was exceedingly clear that Premia owed a fiduciary duty to LTH as LTH's proxy BNM license-holder. The BNM license was the legal ticket to enable LTH to put the Kad TH Project in motion. Thus, it is within Premia's fiduciary duty to ensure that the Kad TH Project to be a success so as to allow LTH to reap the benefits from the same project.

[55] The parent-subsidiary relationship between LTH and Premia was not at all the typical commercial relationship between a parent company and an independent subsidiary who existed as a separate commercial arm with its own independent commercial vision and mission. Premia existed solely for LTH's commercial interest in the Kad TH Project. Thus, by the same provisos and exception elucidated within the Federal Court decision in *Alcaltel-Lucent* itself, it would clearly mean that Premia and LTH ought to be considered as the same one and singular entity.

[56] Thus, considering the explicitly in-depth involvement of Premia together with LTH in the pursuit of realising the Kad TH Project, justice would require that both Premia and LTH be considered as one and the same entity.

[57] In this regard we are in full agreement with the counsel for the respondent that it is patently clear from the evidence that LTH was the primary contracting party under the debit card SPA and retained absolute control over the entire card Kad TH Project. Premia was introduced by LTH as a special

purpose vehicle to entirely hold the prepaid card. The incorporation and of the second appellant by LTH served no other purpose other than the realisation of the Kad TH Project.

[58] In addition, we must emphasise that since the incorporation and introduction of Premia, all dealings between the parties had reflected a tripartite arrangement/agreement to which there were no demarcation at all drawn between LTH and Premia in their dealings with the respondent.

[59] The appellants cannot now baselessly deny their primary purpose in the inclusion/bringing of Premia in the Kad TH Project in an attempt to isolate Premia from any liability.

[60] We are also aware that the appellants also argued that the respondent had not specifically or sufficiently pleaded a case on fraud to pierce the corporate veil. Now, of course in cases involving fraud, the claimant must sufficiently plead the particulars of fraud that he alleges. Consequently, since the respondent's claim was not based on fraud, the respondent of course had not pleaded any particulars of fraud. Nonetheless, as we have iterated earlier, fraud is not at all the be all and end all fact that would entitle the court to lift the corporate veil.

[61] Thus, it was not necessary for the respondent to plead a case on fraud so as to entitle them to lift the corporate veil. It suffices that the respondent sufficiently pleads facts that would prove that the justice requires that the corporate veil to be lifted. If there were already sufficient facts pleaded by the repondent (of which there was definitely plenty) to refer to the exercise of lifting the corporate veil, then the respondent would already be within its rights to contend for the corporate veil to be lifted. Suffice that we refer to the case of *RDS Bina Sdn Bhd v Ong Chin Hoe & Anor* [2014] 11 MLJ 606:

> [39] Here, this rule is not offended at all as the plea has indeed been raised and in my view, more than adequately. *The plaintiff has pleaded sufficiently* and there is no prejudice alleged or otherwise occasioned to the defendant. I *agree with learned counsel for the plaintiff that no specific language is required. Although the words 'lifting of the veil of incorporation' may not have been specifically used, there are more than adequate pleas in this statement of claim to satisfy the dictates* of the Rules of Court 2012; and capture the essence of the plea. (Emphasis added.)

[62] In these circumstances, we are of the considered view that the learned judge was astutely correct in his finding of joint and several liability of the appellants and there is no reason for us to disturb the same finding.

A EXEMPLARY DAMAGES

[63] We will now address the challenge made by the appellants in respect of the learned judge's decision in awarding the respondent exemplary damages in the sum of RM2m. The appellants strenuously argued before us that the learned judge had clearly fell into error when he granted the respondent exemplary damages. The appellants contended that the learned judge had not indicated in his grounds of judgment that he had in his mind the general principle as to when and how a court in a commercial context would grant exemplary damages. More so, it is settled law that in a pure commercial and contractual claim, the granting of exemplary damages can only arise in a very exceptional case.

[64] Upon our perusal of the grounds of judgment of the learned judge, we understood that the learned judge had found it appropriate to award exemplary damages on the sole ground that the appellants have caused so much inconvenience to the respondent due to the constant shifts in the features as to the nature of the card.

[65] On the other hand, the counsel for the respondent had strongly urged us to maintain the learned judge's award of exemplary damages. The counsel submitted that the respondent's case falls within the scope or threshold in which exemplary damages ought to be granted.

[66] In *Rookes v Barnard* [1964] AC 1129, the English court (the House of Lords) had propounded that an award of exemplary damages would be justified in three categories of cases, namely: (a) oppressive, arbitrary or unconstitutional conduct by government servants; (b) conduct calculated to result in profit to the defendant; and (c) where granting of such exemplary damages was expressly authorised by statute.

[67] We must take cognisance that the legal principle expounded in *Rookes v Barnard* is the leading authority regarding the award of exemplary damages and the same principle had been adopted in many local precedents in the Malaysian courts.

(See: *Sin Heap Lee-Marubeni Sdn Bhd v Yip Shou Shan* [2005] 1 MLJ 515; *Templeton & Ors v Low Yat Holdings Sdn Bhd & Anor* [1993] 1 MLJ 443; *Laksamana Realty Sdn Bhd v Goh Eng Huat and another Appeal* [2006] 1 MLJ 675; *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784; *Lembaga Kemajuan Tanah Persekutuan (FELDA) & Anor v Awang Soh bin Mamat & Ors* [2009] 4 MLJ 610; *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1993] 3 MLJ 352.)

[68] Very recently, in the case of *Big Junkyard Sdn Bhd & Anor v Chan Kah Wai (berniaga dibawah nama Ytwo Coffee House)* [2022] MLJU 2923; [2023] 1 CLJ 564, the Court of Appeal had revisited the principle set out in *Rookes v Barnard*. The Court of Appeal held that there are two parts in granting exemplary damages. The first part is to clear the threshold. It is incumbent for the plaintiff to show that he falls within one of the three categories of cases set out in *Rookes v Barnard*. The failure to cross this threshold is fatal for a claim for exemplary damages. Once the plaintiff has fulfilled this threshold, then the second part is, then it incumbent on the plaintiff to prove the 'outrageous' conduct of the defendant.

[69] It must be reminded that the outrageous conduct must be well beyond mere wrongful act and must be so exceptionally oppressive, offensive, contumelious, and motivated by malevolence or insolence. Mere wrongful conduct is insufficient to entitle a claimant to claim more than the sum that is already sufficiently compensatory to him. And in the scope of a commercial contract, a mere act or conduct in breach of a contract is certainly not sufficient to entitle a claimant to exemplary damages. The Court of Appeal in *Big Junkyard* held the following:

> The conduct must be high-handed or malicious act or an act done in an oppressive manner. *Mere wrongful conduct is not sufficient*. There must be something exceptional in the act that was done. The matter was lucidly stated by Lord Devlin in *Rookes v Barnard* [1964] AC 1129 ... (Emphasis added.)

[70] We also recognise that exemplary damages (if proven to be appropriate) can be awarded in both contractual and tortious claims.

[71] Applying the first part of the 'threshold test' propounded in *Rookes v Barnard*, we have to first identify whether or not the case before us falls within any of the three categories as listed by the House of Lords.

[72] It is obvious that the appellants were not servants of the government. Therefore, no argument can arise that there has been any oppressive, arbitrary, or unconstitutional action taken by the servant of the government.

[73] Were the appellants' conduct calculated or designed to make a profit for themselves which may well exceed the compensation payable to the respondent? We are unable to identify how the appellants were able to garner any kind of profit from the failed Kad TH Project as the objectives of the service provider agreement did not materialize. We were made to understand that no cards under the Kad TH Project were ever issued to any of the first appellant's depositors.

[74] Are the exemplary damages claimed by the respondent in this case

expressly authorised to be awarded by a statute? We do not believe so as there is no statute that expressly authorized the granting of exemplary damages to the respondent. The answer is an obvious negative.

[75] Thus, the respondent would have not satisfied the first part of *Rookes v Barnard*'s threshold test. For the sake of completion, we will also briefly test the facts of this case against the second part of the threshold test. In the second part of the threshold test, the respondent must prove that the conduct by the appellants was so outrageous to the extent that it was so repugnant and abhorrent that it would warrant this court's condemnation and denunciation (vide a punishment by means of awarding additional damages). An outrageous conduct had been defined by the Court of Appeal in the case of *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018] 1 MLJ 784:

> [33] The exemplary damages or punitive damages — the two terms now regarded as interchangeable — are additional damages awarded with reference to the conduct of the defendant, to signify disapproval, condemnation or denunciation of the defendant's tortious act, and to punish the defendant. Exemplary damages may be awarded where the defendant has acted with vindictiveness or malice, or where he has acted with a 'contumelious disregard' for the right to the plaintiff. The primary purpose of an award of exemplary damages may be deterrent, or punitive and retributory, and the award may also have an important function in vindicating the rights of the plaintiff (see *Rookes v Barnard* [1964] 1 All ER 367; *AB and others v South West Water Services Ltd* [1993] 1 All ER 609; *Broome v Cassell & Co Ltd* [1971] 2 QB 354; *Laksmana Realty Sdn Bhd v Goh Eng Hwa and another appeal* [2006] 1 MLJ 675).

[76] Now, we are minded that there was indeed wrongful conduct and breach of the draft prepaid card SPA by the appellants who had terminated the parties' contracts on the misplaced ground of alleged breach of the debit card SPA by the respondent. We are aware and are resolute in our finding that indeed the appellants had done a commercial and contractual wrong against the respondent. Nonetheless, as we have iterated earlier, mere wrongful conduct does not necessarily warrant the court's award of exemplary damages.

[77] The learned judge had awarded exemplary damages on the grounds that somehow the appellants had taken the respondent for a 'ride' by constantly tilting, shifting, and changing the features they require the card to be in the Kad TH Project. We have to disagree with the learned judge's finding for two reasons:

(a) change, dynamism, and adaptability is common in any commercial endeavours. It must be minded that a portion of the change in features were also due to BNM's rejection and suggestion as well (which was beyond any parties' control). The change in features (although can be

seen as onerous) is not exactly a 'wrongful conduct'. The wrongful conduct in this case was the wrongful termination of the draft prepaid card SPA; and

(b) if the constant shifting of the features were indeed too onerous, it was always open to the respondent to refuse to comply and insist on the original terms agreed upon with the appellants. But instead the respondent obliged and went along with the appellants' shifts and changes. This was acquiescence on the respondent's part, which inversely brought upon the very same acquiescence on the appellants' part which becomes the respondent's ground to insist that the terms of the prepaid card SPA were already agreed upon and performed by the appellants. The learned judge cannot leverage the parties' mutual acquiescence as grounds to award exemplary damages.

[78] In any case, we are also minded that there were indeed circumstances in the case that brought upon the confusion as to the actual and real terms which were covenanted by all parties. There were changes as to the features well beyond the scope of the debit card SPA, and yet there was still no properly executed variation of the debit card SPA. At the same time, communications, instructions, and performance of the draft prepaid card SPA was also already well underway.

[79] Of course, the correct legal position (as we have found earlier) was that the appellants were in the wrong for terminating the draft prepaid card SPA (which was acquiesced by the appellants) on the grounds of breach of the debit card SPA. Yet it cannot be said that their wrongful conduct in breach of the contracts was so malevolently driven, vindictive, and in contumelious disregard of the respondent's interest.

[80] The appellants' conduct (although in breach of the draft prepaid card SPA) cannot be equated to an outrageous conduct warranting the grant of exemplary damages. Therefore, the learned high court judge has manifestly erred when he found that both the appellants are jointly and severally liable to the respondent for the sum of RM2m in exemplary damages.

OUR DECISION

[81] Based on the above considerations, we allow the appellants' appeal in part. We dismiss the appellants' appeal on the learned judge's findings as to liability and as to quantum of compensatory damages (award of expectation loss or loss of profits). Thus, the learned judge's finding on liability and award of loss of profits shall be maintained.

[82] However, we allow the appellants' appeal strictly and limited against the

learned judge's wrongful award of exemplary damages. Thus, the learned judge's award of RM2m as exemplary damages is hereby set aside.

[83] We also order total costs of RM50,000 to be paid by the appellants to the respondent, subject to allocatur.

Appeal allowed in part.

Reported by Ahmad Ismail